**TeleTech Holdings, Inc. *and* Communications Workers of America, AFL–CIO.** Case 3–CA–21862

February 27, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On August 15, 2000, Administrative Law Judge Karl H. Buschmann issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] only to the extent consistent with this Decision and Order.

The Respondent operates telephone call centers for corporate clients. At its Niagara Falls facility, it provides 24-hour customer service for customers of a large telecommunications company. Beginning in late 1998 and extending into the spring of 1999, some of its Niagara Falls employees were involved in union organizing activities. The General Counsel alleged in the complaint that, in reaction to these activities, the Respondent engaged in several instances of unlawful conduct. The General Counsel also alleged that two statements in its employee orientation booklet constituted unlawful workplace rules violating Section 8(a)(1). The judge found that the Respondent violated the Act by engaging in coercive interrogations and polling of employees, and he otherwise dismissed the complaint.

The General Counsel excepted, among other things, to the judge's dismissal of the 8(a)(1) allegations involving the two rules in the Respondent's orientation booklet. We find merit in these exceptions, and, contrary to the judge, we will find these violations as alleged.

The Respondent's formal policy on distribution of literature, which the General Counsel concedes is lawful, is set forth in its "Policies and Procedures" document.[3] Although employees are not given copies of the "Policies and Procedures," the policies found there are reviewed with new employees during orientation. In addition, the "Policies and Procedures" can be found on the Respondent's computer website, and a copy is posted periodically on the employee breakroom bulletin board. The "Policies and Procedures" document does not address the presence of off-duty employees on its property.

There is, however, a property-access rule for off-duty employees, as well as another no-distribution rule, in a booklet called the "TeleTech Welcome Book." This booklet is provided to all new TeleTech employees when they begin employment.

Several sections of the Welcome Book are relevant to our review. The first page of the booklet states the following:

> This employee welcome booklet is designed to help you become better acquainted with the company. This publication does not include official TeleTech policies and procedures. For specific answers on those, please contact your immediate supervisor or a human resources representative. They will be happy to answer your questions and provide you with any information you need.

At page 11 of the booklet, at the beginning of a section entitled "Professional Standards," the following statement is set forth:

> This booklet does not catalog TeleTech's policies and procedures. Your immediate supervisor or human resources representative has access to TeleTech's Policies and Procedures document and can answer specific questions. Some of those policies will be given to you and discussed during orientation. The following abbreviated guidelines are offered here to help you get started on the right foot.

Immediately following on page 11 is a subsection entitled "Professional Conduct," with this introduction:

> Some examples of infractions that may result in disciplinary action (up to and including termination) are listed below. This list is not all inclusive, and conduct that is not listed here may also result in disciplinary action. If you have questions regarding

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The judge dismissed the allegation that employee Frank Butry was discriminatorily discharged because of his activities on behalf of the Union. We agree with him that the General Counsel did not establish that the Respondent was aware of Butry's protected activities, and that therefore the General Counsel did not meet his initial *Wright Line* burden. Accordingly, we find it unnecessary to rely on the judge's alternative analysis of the Respondent's *Wright Line* rebuttal showing.

[3] It states, in relevant part, that on the Respondent's premises "employees may not solicit or distribute literature during working time for any purpose," and that "employees may not distribute literature at any time in working areas."

these or related issues, please speak to your supervisor or a human resources representative.

Several examples of prohibited conduct are listed, including "soliciting products or distributing literature without proper authorization," and "unauthorized presence on the premises while off duty." These two rules are the basis for the alleged violations at issue before us.[4]

The judge found that the statement on the Welcome Book's first page and the first statement under "Professional Standards" on page 11 were "clear and unambiguous disclaimers." He further opined that, in view of these disclaimers, the listed examples of prohibited conduct on page 11 were intended to serve merely as "guidelines" and did not reflect the Respondent's official policies. He noted that the General Counsel had conceded the lawfulness of the Respondent's literature distribution policy in its "Policies and Procedures." He concluded that in the circumstances, the allegedly unlawful no-distribution and off-duty employee access rules were not coercive of Section 7 rights, and he dismissed these allegations. We disagree. Each of the allegations are addressed separately below.

*A. The No-Distribution Rule*

A rule prohibiting distribution of literature on employees' own time and in nonworking areas is presumptively invalid. See, e.g., *Our Way, Inc*., 268 NLRB 394 (1983); *Stoddard-Quirk Mfg.*, 138 MLRB 615 (1962). A no-distribution rule which is not restricted to working time and to work areas is overly broad and presumptively unlawful. See, e.g., *MTD Products, Inc.*, 310 NLRB 733 (1993). The mere existence of an overly broad rule of this kind tends to restrain and interfere with employees' rights under the Act, even if the rule is not enforced. *Brunswick Corp.*, 282 NLRB 794, 795 (1987). Further, any distribution rule that requires employees to secure permission from their employer prior to engaging in protected concerted activities on an employee's free time and in nonwork areas is unlawful. Id.

The statement on page 11 of the Welcome Book prohibits employees from "distributing literature without proper authorization," with disciplinary sanctions up to and including discharge. It is presented as a rule of conduct. It is overbroad because it is limited neither to working time nor to working areas. It also requires employees to secure "proper authorization" before engaging in any distribution. Accordingly, this no-distribution rule is presumptively unlawful.

When a rule of this kind is found presumptively unlawful on its face, the employer bears the burden to show that it communicated or applied the rule in a way that conveyed a clear intent to permit distribution of literature in nonworking areas during nonworking time. *Ichikoh Mfg.*, 312 NLRB 1022 (1993), enfd. 41 F.3d 1507 (6th Cir. 1994). A clarification of an ambiguous rule or a narrowed interpretation of an overly broad rule must be communicated effectively to the employer's workers to eliminate the impact of a facially invalid rule. *Laidlaw Transit, Inc.*, 315 NLRB 79, 83 (1994). Any remaining ambiguities concerning the rule will be resolved against the employer, the promulgator of the rule. See *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992).

The Respondent argues in support of the judge's view that the existence of the lawful no-distribution rule in its "Policies and Procedures" document cancels any unlawful impact of the rule set forth in the Welcome Book. Critical to this theory is the presence of the two statements in the Welcome Book which the judge identified as "disclaimers."

In this case, a finding of a disclaimer of the invalid rule would require that the Respondent demonstrate that it clearly disavowed or repudiated it. The general statement found on the first page of the Welcome Book does not disavow or repudiate anything. The statement that the booklet "does not include official TeleTech policies and procedures" seems reasonably to mean that a *formal* rendition of such policies and procedures is available elsewhere. It does not suggest that the information in the Welcome Book is false or inaccurate. It is also 10 pages removed from the rule at issue, and thus does not specifically address it.

The statement on page 11, at the beginning of the Professional Standards section, also does not constitute an effective disclaimer. Rather than disavowing any of the booklet's contents, it points out only that the Welcome Book generally is not a complete listing of the Respondent's practices and procedures, i.e., it is not a "catalog." It also states that the booklet comprises "abbreviated guidelines" for employee conduct, and by explicitly listing the no-distribution rule, emphasizes that infraction of that rule may result in discharge.

We find that nothing in the Welcome Book operates as a disclaimer of the presumptively unlawful no-distribution rule. In addition, the fact that the Respondent may discuss with new employees its lawful no-distribution policy at their orientation, and the policy's availability on the Respondent's website and periodically on bulletin boards, are simply inadequate to offset the impact of the rule in the Welcome Book. It was the Respondent's obligation to disavow the unlawful rule to its employees, or otherwise to affirmatively communicate its clear intention to allow appropriate distribution of

[4] The General Counsel does not contend that the "soliciting products" portion of the first rule violates the Act.

literature. The Respondent did not establish that it met this obligation. Finally, it is noteworthy that when employees were engaged in organizational activities in the spring of 1999, the Respondent reaffirmed the unlawful rule to employees in its "Weekly Memo" by reminding them that distribution of leaflets required company approval.[5]

For the reasons above, we find that the Respondent has not rebutted the presumptive unlawfulness of the no-distribution rule in its Welcome Book, and accordingly that its maintenance of the rule violated Section 8(a)(1).

*B. The No-Access Rule*

As discussed above, page 11 of the Welcome Book also identified as prohibited conduct "unauthorized presence on the premises while off duty." A no-access rule for off-duty employees is valid only if it limits their access solely with respect to the interior of the plant premises and other working areas; it is clearly disseminated to all employees; and it applies to off-duty employees seeking access to the plant for any purpose and not just those employees engaging in union activity. In addition, a rule denying off-duty employees access to parking lots, gates, and other outside nonworking areas is invalid unless sufficiently justified by business reasons. *Tri-County Medical Center*, 222 NLRB 1089 (1976). See also, e.g., *Fairfax Hospital*, 310 NLRB 299, 308–309 (1993). Applying the *Tri-County* principles, it is clear that the rule at issue is both substantially overbroad and improperly requires prior authorization for off-duty access. See *Brunswick Corp.,* supra, 282 NLRB at 795.

The Respondent offered no business justification for its no-access rule. Consistent with our analysis of the no-distribution rule above, there is no disclaimer of this rule in the Welcome Book or elsewhere, and the Respondent did not otherwise repudiate it. Moreover, unlike the no-distribution rule, there is no *lawful* no-access rule in the Respondent's "Policies and Procedures" document. For these reasons, we find that the Respondent maintained an unlawful no-access rule in violation of Section 8(a)(1).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set out in full below, and orders that the Respondent, TeleTech Holdings, Inc., Niagara Falls, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating and systematically polling its employees concerning their union sympathies.

(b) Maintaining an overly broad rule which prohibits the unauthorized distribution of literature.

(c) Maintaining an overly broad rule which prohibits the unauthorized presence of off-duty employees on its property.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the rule on page 11 of its TeleTech Welcome Book which prohibits "distributing literature without proper authorization."

(b) Rescind the rule on page 11 of its TeleTech Welcome Book which prohibits "unauthorized presence on the premises while off duty."

(c) Within 14 days after service by the Region, post at its facility in Niagara Falls, New York, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 30, 1999.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

[5] The General Counsel did not allege or litigate a separate 8(a)(1) violation concerning this statement in the "Weekly Memo."

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate or poll our employees concerning their union sympathies.

WE WILL NOT maintain any overly broad rule which prohibits the unauthorized distribution of literature.

WE WILL NOT maintain any overly broad rule which prohibits the unauthorized presence of off-duty employees on our property.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the rule on page 11 of our TeleTech Welcome Book which prohibits "distributing literature without proper authorization."

WE WILL rescind the rule on page 11 of our TeleTech Welcome Book which prohibits "unauthorized presence on the premises while off duty."

## TELETECH HOLDINGS, INC.

*Ron Scott, Esq.*, for the General Counsel.

*Peter M. Panken* and *Jeffrey D. Williams, Esqs. (Epstein, Becker & Green, P.C.),* of New York, New York, for the Respondent.

### DECISION

### STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge. This case was tried in Buffalo, New York, on October 28 and 29, 1999, and on April 24, 2000, upon a complaint issued on September 24, 1999, alleging that the Respondent, TeleTech Holdings, Inc. violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The charges were filed by Communications Workers of America, AFL–CIO (CWA) on April 5, 1999, as amended on June 14 and on September 21, 1999. The Respondent, filed a timely answer in which the jurisdictional allegations were admitted and the substantive allegations of unfair labor practices were denied.

The issues are whether the Respondent (a) coercively interrogated and polled employees about their union sympathies; (b) maintained an overly broad no-distribution rule and a rule restricting employees from being on the company premises; (c) solicited employees to report the union activities of other employees and told employees that union literature was not permitted on company premises; and (d) discharged employee Frank Butry because of his union activity.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and the Respondent, I make the following

### FINDINGS OF FACT

### JURISDICTION

The Respondent, a Delaware corporation with an office and place of business in Niagara Falls, New York (Niagara Falls facility), is engaged in the operation of call centers for corporate clients. With services valued in excess of $50,000 directly to customers located outside the State of New York, and purchases and receipts at its Niagara Falls facility of goods and materials valued in excess of $50,000 from points outside the State of New York, the Respondent is admittedly engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union is admittedly a labor organization within the meaning of Section 2(5) of the Act.

#### The Facts

The Respondent employs more than 1000 employees, including about 400 "advisors" at its Niagara Falls facility to provide 24-hour customer service to customers of GTE Communications. The work of advisors consists of answering the incoming customer service calls about GTE's telephone service, including questions about the repair, sale, and costs of telephones. TeleTech routinely conducts random surveys of GTE's customers to assure quality service.

Frank Butry was one of Respondent's advisors who had engaged in union activities and who was discharged after his performance scores fell below acceptable standards. Butry worked for the Respondent from August 15, 1998, to April 1, 1999. He described his job as follows (Tr. 36–37):

> Well, I'll try to be as brief as possible. Actually, what an Advisor does is take incoming telephone calls from the GTE customers in either California, Texas, the State of Washington, and the State of Florida. These calls are, I guess [are] just like catch-all calls. You don't know what type of call you're going to get. You could get a general repair issue. It could be something about an internet problem. It could be for a sale. It could be for billing. Just general questions. So basically you're answering the telephone and you were trying to do the best you could, answering the customers' questions when they did call you.

When Butry was hired, he, like all newly hired advisors, took a 6-week training program and was given an employee brochure called "TeleTech Welcome Book" (GC Exh. 18). The booklet contains a summary of employee benefits, a brief history of the Company and a statement of "Professional Standards," including a set of rules defining "Professional Conduct." Listed among the examples of infractions resulting in disciplinary actions are, "Soliciting products or distributing literature without proper authorization" and "unauthorized presence on the premises while off duty" (GC Exh. 18).

Throughout Butry's employment, his job performance was subject to periodic monitoring. Indeed, employees were expected to sign a "Monitor Agreement", which Butry had signed on August 10, 1998 (R. Exh. 1). He had received 6 weeks of training and testified that he was familiar with the quality assurance rules (Tr. 94):

> I understood the quality assurance rules to be concise on the phone and clear, not to speak fast, select you diction, what you say, what you shouldn't say, to identify sales opportunities and basically when you end the call, end the call correctly, as well, thanking them for calling or thank you for calling GTE.

Advisors were expected to meet a monthly cumulative score of at least 85 percent. Anthony Quarantillo, advisor supervisor for the Respondent, testified as follows (Tr. 343–344):

> The quality scores were the most important aspects of an agent. It's a direct, we represent GTE Communications. And we're, in our center and the other centers are the only people that anyone who calls to sign up for GTE Service will speak with.

> Q. And was there any score that, that advisors were expected to maintain in quality?
>
> A. Advisors must maintain a minimum monthly average of 85 percent.
>
> . . . .
>
> Q. Number two, they had to maintain at least a score of a 75 per randomly monitored call?
>
> A. Yes. Because the, the difference in scores is an advisor can be scoring high in the 90s and get a bad call. What I mean by bad call is they don't score well on all the categories. It may fall under 75. But their average still can be, or usually will be above 85, even if they get a bad call in there.

According to Respondent's Consumer Performance Guidelines which in great detail set forth the Respondent's monitoring policy, scores of 50 percent or less trigger an automatic written warning to the advisor (GC Exh. 20). The performance monitoring is done by three entities. They are TeleTech assurance specialists, GTE personnel, and a third party vendor, as explained by Lynn Jasper, quality assurance manager in the Niagara Falls Center (Tr. 259):

> Let me give you an idea of who does monitoring. TeleTech employs me and my team, the Quality Assurance Specialists, to monitor. GTE, themselves, in their Ervine, Texas site, has a team that also does the monitoring. They also, at times, outside, hire outside vendors to monitor, as well.

She estimated that one percent of all incoming calls are monitored by TeleTech alone. These specialists are required to complete a quality assurance evaluation form (R. Exh. 3). The TeleTech monitoring guidelines establish the criteria to guide the evaluators in filling out the evaluation form (R. Exh. 2). When asked how the monitoring process works and how incoming calls are monitored, Jasper testified, evaluators listen to the calls (Tr. 258):

> Oh, there's several different ways that we can monitor. What we have is each QA Specialist has a terminal, a cassette recorder, a headset, and access to the same systems that the Advisors have, so that we can see what they're doing and hear what they're doing simultaneously with them. At the same time that we're hearing the live content, we're also recording it for review, because it takes more than one listen to evaluate a conversation.

From October 14, 1998, to April 1, 1999, Butry was evaluated by different quality assurance specialists on 25 occasions (GC Exh. 6). He exceeded the 85-percent passing grade on eight different occasions. The remaining scores fell below the expected average. Butry received the lowest scores on March 17, 1999, with a 36.84 percent and on April 1, 1999, when he received a 28.57 percent.

Supervisor Tony Quarantillo, counseled Butry on several occasions in an effort to assist him to improve his scores (GC Exh. 13). On December 1, 1998, Quarantillo gave Butry a verbal warning because of Butry's score of 78.8 percent in November 1998 (GC Exh. 21). Quarantillo developed a "success action plan" for Butry on March 18, 1999 because of several low scores in March 1999 (GC Exh. 9). And on March 22, 1999, Quarantillo met with Butry again for a counseling session because of scores which fell below the expected average scores. Butry also received a final warning on March 25, 1999 (GC Exh. 22).

On April 1, 1999, after Butry had received his lowest score of 28.5 percent, Quarantillo met with Butry and another supervisor, James LaMoy, and informed Butry that he was discharged. The counseling notice of April 1, 1999, states (GC Exh. 25):

> Frank received a score of 28.5 on April 1, 1999. Because of Frank's previous discipline for unsatisfactory work quality, this performance will result in termination.

Butry noted on this form: "I do not agree with any proceedings by TeleTech. I want an investigation in this matter." Butry testified about his exit interview as follows (Tr. 89–90):

> I just felt that I guess I knew this was coming and I felt horrible about it. . . While Tony was writing, I guess, on the termination notice or whatever, when Tony was writing that, I told Tony, I says "I think we both know the real reason why I got fired." And Jim [LaMoy] leaned back and that's when he softly spoke the word "Union."

The General Counsel's position agrees with Butry's comment that his union activity—not his working record—was the real reason for his discharge. In this regard, the record shows that Butry was a union supporter and activist. In November 1998, he contacted the Union, Communications Workers of America (CWA) in Washington, D.C. which referred him to Jeff Lacher, the Union's district organizing coordinator. Lacher met Butry at his home in December 1998. Butry spoke to 20 fellow employees and invited them to a union meeting in January 1999 held at an employee's home. About 14 employees attended. The meeting was held in secrecy, because as Butry testified, "fearing for jobs, we were very selective and secretive on who we asked" (Tr. 41). Butry and his fellow employees held another meeting in January at a local union hall to which about 70 people were invited. Only about 15 employees actually showed up. The attendance was disappointingly low, so Butry and his friends decided to hold a party with flyers announcing a "March madness" party. Butry and other employee organizers distributed about 60 flyers. Although the party did not feature the Union, Butry used the occasion to solicit for the Union many of the 50 employees who had attended the March madness party.

Within a few days of the March madness party, The Weekly Memo, a publication distributed to the employees by management, featured a reminder that the solicitation and distribution of leaflets required company approval.

Following Butry's termination, the Union's campaign continued. In late April and early May 1999, for a period of about 4 weeks, Lacher and other union members stood outside Respondent's facility on a sidewalk to solicit employees and pass out union literature. On April 27, 1999, Lacher and several other employees observed a security guard for the Respondent standing at the entrance as follows (Tr. 192):

> Yeah, a few minutes after we got there, a person in kind of a black or navy suit jacket with a red tie, that looked like some kind of official position there, he had a little marker on him, stepped out of the front doors and stood kind of in the middle of that alcove area, watching us, looking directly at us.
>
> People would walk by and kind of wink to us, acknowledging that we were there, but they, you know, would kind of signal that we're not coming over now. And we assumed it was because of the security guard, so we decided to move down to the very end of the road, which was quite a distance from the door at that point.

Even though Lacher and the employees had moved, the security guard continued to observe them and the following ensued (Tr. 195):

> So I asked him if he was a security guard. He said yes, and began walking closer to the door, so I asked him "Is this where you're normally posted?" He says, "No, I'm usually on the other side of the building" . . . So I explained, you know, "We are Union representatives and it is illegal for management to have you out here surveilling us." And his reaction was kind of to throw up his hands and say "Well, I didn't" and then he turned around and walked inside.

Shortly thereafter, Paul Hennigan, Respondent's manager for safety and loss prevention, confronted Lacher saying, "I hear that you threatened my security guard" (Tr. 196). The two men argued until one of them called the police. The local police arrived, spoke to the individuals and left without taking any action.[1]

Another union-related incident occurred in late April 1999. Donna Woods, a former employee, testified that Supervisor Melinda Scott approached her at her workstation, known as a "pod," with a paper pad and a union leaflet. Woods described the encounter as follows (Tr. 152):

> She started on the other side. At first I didn't realize what she was doing until she came around to my side. She had a pad of paper with her and a flyer that had been, they had been passing out, and the Union had been passing out about the meeting that night. She was, would look, we all had name plates up on the desk. She looked at the nameplate, wrote my name down and asked if that was my name. I said yes. I didn't know what she was doing at the time, so she sat down and showed me the flyer about the Union. She said, she asked me if I was aware of what was going on. I said yes. And, at that time I could see what she had written on some of the other employees she had already spoke to. Basically, she was writing down comments on their views of the Union. She came right out and told me that, in her opinion, a call center environment does not need a union and then asked me what my opinion was. While she was going through that, I could read that she had written down on some people "It doesn't affect them," "They don't care about it." I didn't see what she wrote on mine, but I didn't really give her an answer one way or the other, if I was for it or against it.

Finally, the record contains the testimony of Jeffrey Paonessa, employed by TeleTech as a coordinator, who initially failed to appear as a witness pursuant to a subpoena and whose testimony was finally compelled by a subpoena enforcement action. As a witness, Paonessa gave inconsistent and vague answers. His demeanor was uncooperative. His prior deposition and his unsigned affidavit were made part of the record (GC Exh. 28). Paonessa testified, as is also reflected in his prior disposition, that his Supervisor Edward Everett told the employees that union literature was not permissible during job work hours. Paonessa also testified, albeit reluctantly, that the substance of his unsigned affidavit was true (GC Exh. 28). However, he also stated, referring to the affidavit (Tr. 418): "I disagreed with the whole thing, considering the circumstances." And when asked whether his prior statements were untrue, he responded: "Like I said to you previously, it was just strictly hearsay . . . [h]earing something through the grapevine." I found the entire testimony of this witness to be so evasive and unresponsive that it lacked the degree of credibility and trustworthiness, necessary for any evidentiary findings.

Analysis

According to the General Counsel, the Respondent's handbook, titled TeleTech Welcome Book, contains two provisions, which violate the employees' Section 7 rights. The first is a restriction on the distribution of literature without proper authorization and the other the "unauthorized appearance on the premises while off duty" (GC Exh. 18). Acknowledging that those statements do not necessarily reflect the Respondent's official policy, and that the Respondent has a formalized policy on solicitation and distribution of literature, the General Counsel's nevertheless argues that the statements are coercive because the messages in the handbook are generally disseminated to the employees. While it is true that employee's protected concerted activity may be restrained by a rule prohibiting the distribution of union literature or a restriction on access to company premises, a cursory examination of the handbook informs the reader on page one:

> This publication does not include official TeleTech policies and procedures. For specific answers on those, please contact your immediate supervisor or a human resources representative. They will be happy to answer your questions and provide you with any information you need.

Again, under the general heading of "Professional Standards" and "general guidelines" where the alleged violative restrictions are found, the lead paragraph states as follows:

> This booklet does not catalog Teletech's policies and procedures. Your immediate supervisor or human resources representative has access to Teletech's Policies and Procedures document and can answer specific questions. Some of those policies will be given to you and discussed during orientation. The following abbreviated guidelines are offered here to help you get started on the right foot.

With such clear and unambiguous disclaimers, it is clear that the professional standards are intended to serve as general guidelines only and expressly do not reflect the Company's official policies. The General Counsel concedes that the Respondent's formalized policies on solicitation and distribution of literature do not offend the Act.

Under these circumstances, it is difficult to imagine how these guidelines have any coercive impact on the employees' Section 7 rights. I, accordingly, dismiss these allegations.

The complaint next alleges that the Respondent unlawfully interrogated and polled the employees about their union sympathies. Employee Donna Woods' testimony shows that Supervisor Melinda Scott approached Woods at her work station in April 1999 holding a union leaflet which the employees had passed out the night before. Scott told Woods that the Company does not need the Union. Scott then asked Woods what her opinion was. Woods uncontradicted testimony shows that Scott carried a writing pad. Written on it were the names of the other employees and their comments about the Union. Scott also made notes about Woods' reaction, although she had not expressed her opinion about the Union one way or another. The testimony clearly shows that Scott had methodically approached the employees, expressed her opposition to the Union, then questioned them about the Union, and recorded their comments. The employees' comments that Woods could read appeared ambivalent, suggesting a reluctance on the part of the employees to freely express their true reaction. Considering the totality of the circumstances, it is clear that Respondent's conduct consisting of interrogating and polling the employees about their union sympathies was coercive. *Rossmore House*, 269 NLRB 1176 (1984). I, therefore, find that the Respondent violated Section 8(a)(1) of the Act, as alleged in the complaint.

The discharge of Frank Butry in violation of Section 8(a)(1) and (3) of the Act is vigorously contested by the Respondent and for good reason. Although the General Counsel has shown that Butry was the instigator of the union activity in November 1998 and was ultimately discharged in April 1999, the record is not persuasive that the Respondent knew of Butry's role as a union activist or that the Butry's discharge was motivated by his union activity. The record shows that Butry had contacted the Union in November 1998, that he organized and attended three union meetings, one in December 1998, the other two in January 1999. According to his testimony, Butry had acted in secrecy, avoiding any participation by supervisors or members of management. His March madness party featured the college basketball championship and carefully avoided any publicity of the ulterior motive of the union organizers. According to Butry, his supervisor may have seen the flyer for the party. But the flyer did not say anything about the Union. Butry's discharge, occurred on April 1, 1999, well prior to any further union activities by the employees. The record therefore does not show that the Respondent had any knowledge of Butry's union activity. In this connection, I have not relied upon the hearsay testimony of Nick Cumbo, an employee, to the effect that another employee had told him that the Respondent had a list of 10 union organizers, nor Butry's testimony expressing an assumption that a telephone call from the Union might have been overheard by management. Indeed, as to knowledge, the General Counsel relies upon Butry's testimony that supervisor LaMoy silently whispered the word "union" at the exit interview in April, when Butry inquired about the real reason for his discharge.

LaMoy was called as a witness, and he denied silently mouthing the word "Union." Faced with a direct conflict in the testimony on a crucial point, I credit LaMoy, although I believe that

[1] This episode is alleged to show antiunion animus, but was not alleged as a violation of the Act.

Butry was generally a credible witness. First, I believe that it is exceedingly difficult to read a person's lips accurately so as to know whether the single word, union, was spoken. Second, LaMoy who was not involved in the decision to discharge Butry, had no reason to participate in the conversation or express an opinion. Third, I found LaMoy's brief testimony more plausible, because he as a supervisor would more likely side with management than with Butry. Moreover, the record also shows that the Respondent had a plausible and convincing basis for Butry's discharge. As explained above in detail, it is clear that Butry's performance evaluations fell repeatedly below acceptable levels. His supervisor, Quarantillo, made several attempts to boost Butry's scores by training him. Butry admitted that his scores were very low. They had not only failed to improve but had actually deteriorated. The General Counsel concedes that there is no evidence that the scores were somehow manipulated. Such a hypothesis would, in any case, be difficult to prove given the documentary evidence showing that different "specialists" randomly evaluated the advisors. The record further shows that Butry ranked "sixth from last" out of 122 advisors and that most of the lowest 5 were no longer employed (R. Exh. 14). But even assuming that the Respondent had made out a prima facie case, the Respondent has carried the burden to show that it would have terminated the employment of Butry even in the absence of any union considerations. *Wright Line,* 251 NLRB 1083 (1980). The Respondent showed that the Respondent's quality assurance department ranked its more than 100 advisors at the Niagara Falls Center in March 1999, and that Butry was 6th from the last. Even though Lynn Jasper, Respondent's quality assurance manager, could not specifically identify two of the five advisors who had ranked below Butry, she believed that all five were no longer employed. Butry had consistently the lowest scores on Quarantillo's advisor team, yet Butry conceded that his supervisor tried to help him to improve his scores until the very end. Butry also conceded that he had an awful record. Under these circumstances, it is clear that the 8(a)(1) and (3) allegations in the complaint should be dismissed.

With respect to the remaining allegations in the complaint, the issues relating to supervisor's Edward Everett were the subject of the testimony by Paonessa. For the reasons already discussed, I discredited his testimony, and I accordingly dismiss those allegations. As to the other issues raised by the General Counsel's amendment to the complaint in paragraph 5(d), I find that the amendment was superfluous, because its sole purpose was not to add an allegation of a violation of the Act, but to show antiunion animus, as a result of the conduct of Paul Hennigan, TeleTech's head of security. The General Counsel has demonstrated antiunion animus in connection with the 8(a)(1) violations, which were considered in connection with the discharge of Frank Butry.

## CONCLUSIONS OF LAW

1. The Respondent, TeleTech Holdings, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union, CWA, is a labor organization within the meaning of Section 2(5) of the Act.
3. By coercively interrogating and by the systematic polling of employees regarding their union sympathies, the Respondent violated Section 8(a)(1) of the Act.
4. The Respondent did not commit any other violations of the Act.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]